IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LEONARD TREVINO,	§	
Plaintiff,	§	
V.	§	
	§	
THE VETERAN LAND BOARD OF THE STATE OF TEXAS & CITIMORTGAGE, INC.,	§	A-16-CV-1072-LY-ML
	§	
	§	
Defendant.	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE:

Before the Court are Defendant CitiMortgage, Inc.'s Motion to Dismiss [Dkt. #4] filed September 22, 2016; Plaintiff Leonard Trevino's Rebuttal to Motion to Dismiss and Conditional Acceptance [Dkt. #6] filed October 6, 2016; Defendant CitiMortgage, Inc.'s Reply in Support of Motion to Dismiss [Dkt. #7] filed October 11, 2016; and Plaintiff Leonard Trevino's Answer to Reply in Support of Motion to Dismiss [Dkt. #9] filed October 31, 2016. The Motions and related briefing were referred by United States District Judge Lee Yeakel to the undersigned for a Report and Recommendation as to the merits pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. After reviewing the motions and related briefing, the relevant case law, as well as the entire case file, the undersigned issues the following Report and Recommendation to the District Court.

I. BACKGROUND

Plaintiff Leonard Trevino ("Trevino") initially filed this suit in the 368th Judicial District Court of Williamson County, Texas to prevent eviction following a foreclosure sale on the real property located at 2703 West Messick Loop, Round Rock, Texas 78681 (the "Property"). (Dkt. #1 at 1). Trevino brings a single claim against Defendant CitiMortgage, Inc. ("CMI") for wrongful foreclosure. (Dkt. #1-2 at 3–4). On September 15, 2016, CMI removed the lawsuit to this court based on diversity jurisdiction. (Dkt. #1 at 2–3).

Trevino states he purchased the Property on June 3, 2011, secured by a $207,000 promissory note. (Dkt. #1-2 at ¶ 8). He acknowledges that he fell behind on his mortgage payments and was in the process of obtaining a loan modification when CMI "suddenly and without notice" foreclosed on the Property on December 1, 2015. (*Id.*). Trevino contends he received neither a notice of acceleration of his loan from CMI, nor a notice of sale as required under Texas law. (*Id.* ¶¶ 10–11). CMI foreclosed on the Property on December 1, 2015. (*Id.* ¶ 11). The Trustee's Deed shows that the Property sold for $212,625, while the Williamson County Appraisal District appraised the Property for $261,626. Based on these allegations, he asserts a claim for wrongful foreclosure against CMI.

In its pending motion, CMI moves to dismiss Trevino's claim pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that Trevino fails state a plausible right to relief.

II. STANDARD OF REVIEW

Rule 12(b)(6) provides for dismissal of an action for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is said to be plausible if the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Plausibility will not be found where the claim alleged in the complaint is based solely on legal conclusions, or a "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. Nor will plausibility be found where the complaint "pleads facts that are merely consistent with a defendant's liability" or where the complaint is made up of "'naked assertions devoid of further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557)). Plausibility, not sheer possibility or even conceivability, is required to survive a Rule 12(b)(6) motion to dismiss. *Twombly*, 550 U.S. at 556–557; *Iqbal*, 556 U.S. at 678–79.

In considering a Rule 12(b)(6) motion to dismiss, all well pleaded facts are to be taken as true, and viewed in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). But, as it is only facts that must be taken as true, the court may "begin by identifying the pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. It is only then that the court can view the well pleaded facts, "assume their veracity and [ ] determine whether they plausibly give rise to an entitlement to relief." *Id.*

III. ANALYSIS

Trevino raises a single claim against CMI for wrongful foreclosure. CMI argues that Trevino's claim must fail because he cannot show a required element of the claim—an inadequate sales price—as a matter of law. The undersigned agrees.

To establish a claim for wrongful foreclosure in Texas, a plaintiff must show (1) a defect in the foreclosure sale; (2) a grossly inadequate selling price; and (3) a causal connection between the defect and the grossly inadequate selling price. *Charter Nat'l Bank-Hous. v. Stevens*, 781 S.W.2d 368, 371 (Tex. App.—Houston [14th Dist.] 1989, writ denied). Furthermore, under Texas law, an action for wrongful foreclosure requires evidence of "irregularity, though slight, which irregularity must have caused or contributed to cause the property to be sold for a grossly inadequate price." *In re Keener*, 268 B.R. 912, 921 (Bankr. N.D. Tex. 2001) (quoting *Am. Sav. & Loan Ass'n of Hous. v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975)). The party challenging the foreclosure sale must allege and prove an irregularity in the sale which caused the property to be sold for an inadequate price—inadequacy of consideration alone is not enough. *Powell v. Stacy*, 117 S.W.3d 70, 74 (Tex. App.—Fort Worth 2003, no pet.); *Greater S.W. Office Park Ltd. v. Tex. Commerce Bank*, 786 S.W.2d 386, 390 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

In this case, Trevino has failed to allege an essential element of his wrongful foreclosure claim—a grossly inadequate sale price. In the context of a wrongful foreclosure claim, a grossly inadequate sale price "has been defined to mean, a consideration so far short of the real value of the property as to shock a correct mind, and thereby raise a presumption that fraud attended the purchase." *Richardson v. Kent*, 47 S.W.2d 420, 425 (Tex. Civ. App.—Dallas 1932, no writ). "Texas cases establish that a foreclosure price exceeding 50% is not grossly inadequate." *Water Dynamics, Ltd. v. HSBC Bank USA, Nat'l Ass'n*, 509 F. App'x 367, 368 (5th Cir. 2013) (citing *Terra XXI, Ltd. v. Harmon*, 279 S.W.3d 781, 788 (Tex. App.—Amarillo 2007, pet. denied); *Richardson v. Kent*, 47 S.W.2d 420, 425 (Tex. Civ. App.—Dallas 1932, no writ)).

Trevino's own pleadings show that CMI sold the Property at foreclosure sale for $212,625, which is over 80% of the Property's appraised value of $261,626. (Dkt. #1-2 at ¶ 13). As a matter of law, then, this sale price is not inadequate. Therefore, Trevino cannot sustain a wrongful foreclosure claim under Texas law. Accordingly, his claim should be dismissed with prejudice because amendment would be futile. *See Jones v. Robinson Prop. Grp., L.P.*, 427 F.3d 987, 994 (5th Cir. 2005).

IV. RECOMMENDATIONS

The undersigned **RECOMMENDS** that the District Court **GRANT** Defendant's Motion to Dismiss [Dkt. #4] and **DISMISS** Plaintiff's claim **WITH PREJUDICE**.

V. OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53, 106 S. Ct. 466, 472–74 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

SIGNED April 10, 2017.

MARK LANE
UNITED STATES MAGISTRATE JUDGE